

(1954) 03 BOM CK 0011

In the Bombay High Court

Case No : O. C.J. Miscellaneous Application No. 1 of 1954

Bombay Dyeing and Manufacturing Co. Ltd.

APPELLANT

Vs

M.K. Venkatachalam

RESPONDENT

Date of Decision : 05-03-1954

Acts Referred:

Income Tax Act, 1922 — Section 35

Citation : AIR 1955 Bom 80 : (1954) 56 BOMLR 714 : (1954) ILR (Bom) 971 : (1954) 26 ITR 298

Hon'ble Judges : Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Advocate : Jamshedji Kanga, for the Appellant; Nusserwanji Engineer, for the Respondent

Judgement

Chagla, C.J.—This petition raises a very short and a very important point as to the construction of the Indian Income Tax (Amendment) Act, 1953. The petitioner is the Bombay Dyeing and Manufacturing Co. and the assessment on the petitioner for the year 1952-53 was completed on 9th October, 1952, and an assessment order was made. In that assessment order credit for the sum of Rs. 50,603-15-0 was given to the petitioner. This credit represented interest at 2 per cent. on the advance payment made by the petitioner and the credit was given pursuant to the provisions of Section 18A(5) of the main Act. On 24th May, 1953, the Indian Income Tax (Amendment) Act, which is the Amendment Act, was passed and Section 13 of this Amendment Act amended Section 18A(5) of the main Act and the effect of the amendment was that instead of an assessee getting interest at 2 per cent. on the whole amount of the advance payment, the assessee was only to get interest on the difference between the payment, the assessee was only to get interest on the difference between the payment made and the amount at which the assessee was assessed to tax. The Income Tax Officer purported to act u/s 35 of the Act and passed an order that the petitioner was entitled only to a credit of Rs. 21,157-6-0 by reason of the Amendment Act and issued a notice of demand against the petitioner for the balance of Rs.

29,446-9-0. It is this notice which is challenged on two grounds. One is that the order u/s 35 was made against the petitioner without any notice having been given to it, and the other that the Income Tax Officer had no jurisdiction to make an order u/s 35. With regard to the question of notice Mr. Mistree, who appears for the petitioner, waives the contention. Sir Nusserwanji says that in view of the petitioner having waived notice he will not argue that a petition for a writ is not maintainable.

2. Therefore, the only question that we have to consider is whether on the facts of the present case Section 35 is applicable. Section 35 gives the power to the Income Tax Officer to rectify any mistake apparent from the record, and the question that falls for determination is whether there was any mistake apparent on the assessment order passed on 9th October, 1952, which entitled the Income Tax Officer to rectify it under the provisions of Section 35. It is pointed out that by Section 1(2) of the Amendment Act, the Amendment Act is deemed to have come into force on 1st April, 1952, and therefore when the assessment order was passed on 9th October, 1952, and the law must be deemed to have been as amended by the Amendment Act, and therefore when the Income Tax Officer rectified the assessment order, he did it on the basis that the order was erroneously made, not having been made pursuant to the law as it was amended. In our opinion, it is clear that the error contemplated by Section 35 is not an error which is due to the law being altered subsequent to the date on which the assessment order was made on 9th October, 1952, that order was in accordance with the law. As the law stood then, the petitioner was entitled to the credit of Rs. 50,603-15-0 and that was the credit that was given to the petitioner. It was by reason of the subsequent alteration of law that it may be said that the petitioner was not entitled to Rs. 50,603-15-0 but to a smaller amount. But the test which must be applied for the purpose of application of Section 35 is not what the law was at any subsequent time, not what the law was when the Income Tax Officer exercises his powers u/s 35, but what was the law when the order of assessment was made. The error has to be apparent on the face of that order and that error can only be judged in the light of the law as it was at that date.

3. Emphasis is placed on the fact that the Amendment Act provides that it shall be deemed to have come into force on 1st April, 1952, and Sir Nusserwanji argues that all that the Income Tax Officer was doing was to give effect to the retrospective provisions of the Amendment Act. Now, when one analyses the situation, in effect what the Income Tax Officer has done is to re-open an assessment which was completed on 9th October, 1952, and the question that we have to decide is whether Section 1(2) of the Amendment Act makes the Act retrospective to the extent of permitting the Income Tax Officer u/s 35 to re-open an assessment which has been completed. The answer to that question must be in the negative, because when we look at the other provisions of the Amendment Act it is clear that when the Legislature intended to confer power upon the taxing authorities to re-open and revise assessments which had been

completed, such power has been expressly conferred. There are three sections to which our attention has been drawn where this power has been expressly conferred. The first is Section 3(2) which provides that the amendments made by sub-clause (iii) of clause (b) of sub-section (1) shall be deemed to be operative in relation to all assessments for any year, whether such assessments have or have not been completed before the commencement of the Indian Income Tax Act. The next is Section 7(2) which contains provisions to the same effect, and also Section 30(2). Therefore, it is clear that the mere enactment of Section 1(2) of the Amendment Act was not sufficient to empower the taxing authorities to go behind the assessments that had been completed. If Sir Nusserwanji's contention were sound and if the effect of Section 1(2) was to make the Act retrospective as to enable the taxing authorities u/s 35 to re-open any assessment, then it was unnecessary expressly to make provision in Sections 3(2), 7(2) and 30(2) for re-opening or revising an assessment that had been completed.

4. Sir Nusserwanji has relied on a decision of the Privy Council for the proposition that the error which may be rectified u/s 35 may be an error which is due to events which take place subsequent to the order of assessment. In that case, *Income Tax Commissioner v. Khemchand Ramdas*, the assessee were assessed as a registered firm and as a registered firm they were not liable to pay super-tax. Subsequently, the Commissioner cancelled the order of registration and thereafter the Income Tax Officer assessed the firm to super-tax, and the Privy Council held that the first assessment order was final both in respect of Income Tax and super-tax and the Income Tax Office had no power to make a fresh assessment. In this connection their Lordships point out at page 426 that action could conceivably have been taken u/s 35 of the Act, and Sir Nusserwanji bases this argument on what the Privy Council observes that the Privy council has taken the view that on the facts of that case power could have been exercised u/s 35 of the Act. Now, it is clear that the position that arose under the case before the Privy Council and the case before us is entirely different. In the case before the Privy council when the assessment order was made it was on the basis of the firm being a registered firm at the date when the order was made. The law conferred the power upon the Commissioner to cancel the registration and that power was subsequently exercised by the Commissioner. As soon as that power was exercised, the very basis of the assessment order disappeared, and therefore it is clear that u/s 35 it could be said that the assessment order contained an error on the face of the record because the assessment was made on a registered firm whereas the firm was not a registered firm. It cannot be said of the present assessment order that it was made on any particular basis which basis subsequently disappeared. The present assessment order was made on the basis of the law as it then stood and it was only because the law was subsequently altered that the liability of the petitioner might be considered to have arisen under the amended law. But the liability of the petitioner to be assessed in a particular amount was finally determined on 9th October, 1952,

and that liability was determined according to law. That liability cannot be altered because the law has been subsequently altered or amended.

5. In our opinion, therefore, the notice issued by the Income Tax Officer calling upon the petitioner to pay the sum of Rs. 29,446-9-0 is not warranted by law. The result is that we must issue a writ against respondent No. 1 in terms of prayers (a) and (b) of the petition.

6. The respondents to pay the costs of the petitioner.

7. Order accordingly.